UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CSC HOLDINGS, LLC and CABLEVISION SYSTEMS NEW YORK CITY CORPORATION, a Single Employer,	
Respondent,	
and	
ANDRES GARCIA, Charging Party,	**Case No. 02-CA-138301**
and	
PAUL MURRAY, Charging Party,	**Case No. 02-CA-138302**
and	
BERNARD PAEZ, Charging Party.	**Case No. 02-CA-138303**

CHARGING PARTIES' BRIEF IN RESPONSE TO CABLEVISION'S EXCEPTIONS

Attorneys for Charging Parties

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO – DISTRICT ONE LEGAL DEPARTMENT

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INTRODUCTION

Communications Workers of America, AFL-CIO's Legal Department ("CWA") submits this brief on behalf of Charging Parties Andres Garcia ("Garcia"), Paul Murray ("Murray") and Bernard Paez ("Paez") (referred to collectively as Charging Parties) in response to Respondents CSC Holdings, LLC and Cablevision Systems New York City Corporation's ("Respondents" or "Cablevision") Exceptions to the Administrative Law Judge's decision. The ALJ's decision finding that Cablevision violated Sections 8(a)(1) and (3) of the Act should be affirmed as Cablevision's exceptions have no merit.

Cablevision has and will continue to interfere with the rights of its employees to engage in union activity, if not held accountable. CWA is well aware of Cablevision's unlawful acts having conducted both successful and unsuccessful campaigns to organize Cablevision's workforce.[1] In each case, Cablevision responded with aggressive and often unlawful campaigns to avoid these efforts to unionize. This case is no different.

The Charging Parties, here, were assigned to work in the Bronx until Cablevision unlawfully transferred them and three other employees in May 2014 after the employees threatened to unionize. Cablevision, who was not new to union organizing, responded to these efforts with an anti-union campaign that included transferring six union supporters.

The ALJ correctly found that Cablevision failed to establish any lawful basis for the transfers. Cablevision's claim that the transfers were necessary because employees had failed to report inappropriate conduct is not supported by the record. The only instance of inappropriate conduct that Cablevision alleged involved employee Nicasuis Felix ("Felix"). However,

[1] Administrative notice may be taken of prior representation cases filed by CWA for union recognition with Cablevision, including 2-RC-081294, 2-RC-082138 and 29-RC-070897.

supervisors were not only aware of his inappropriate conduct, but they failed to take any action. There was no basis to transfer the six discriminatees, absent any evidence that they had engaged in any wrong doing or failed to report such conduct. Cablevision's claim that the six discriminatees needed a "fresh start" was a pretext to unlawfully discourage membership in the union. The evidence establishes that the six discriminatees were some of the most vocal employees who complained about recent changes in the workplace and engaged in union activity. The ALJ correctly found that Cablevision's transfer of the six discriminatees violated Section 8(a)(1) and (3) of the Act.

STATEMENT OF FACTS

Background

Charging Parties Garcia, Murray and Paez were employed as Outside Plant ("OSP") technicians at the Cablevision facility located at 500 Brush Avenue, Bronx, New York, until they were involuntarily transferred on May 7, 2014. Three other employees, Ezequiel Lajara ("Lajara"), Wayne Roberts ("Roberts") and Mike Vetrano ("Vetrano") who did not file separate unfair labor practice charges were also transferred to different Cablevision locations and are also alleged discriminatees in the instant matter. Cablevision's alleged reason for the transfers was that employees were failing to report inappropriate conduct, as described in greater detail below.

Charging Parties respectfully refer the Board to the Administrative Law Judge Mindy E. Landow's Decision dated September 23, 2016 for a full recitation of the facts. The facts provided below are intended to highlight the discriminatees' union and other protected activity, Cablevision's knowledge of such activity, and Cablevision's decision to involuntarily transfer the discriminatees.

Protected Activity

Murray testified that OSP Supervisor Ewan Isaacs visited his work location to ask him what was going on with him and the union in June 2013. When Murray denied having any knowledge about the union, Isaacs responded that Executive Vice President of Field Operations Barry Monopoli ("Monopoli") was certain that both Murray and Paez were behind the union. (Tr. 358-359).

Further confirming Cablevision's knowledge of ongoing union activity by the discriminatees was Executive Vice President of Operations Rob Comstock's ("Comstock") email to Chief Operating Officer Kristin Dolan and Executive Vice President of Human Resources Sandy Kapell ("Kapell") on March 12, 2014. It was entitled "Union Activity – Update" and provided, in part, that "[i]n the Bronx, employee mentions of reengaging the union were picked up by management this week and, this morning, 'we need the IBEW now' was found written on a whiteboard in a break room." (GC Ex. 32K). Comstock concluded that "the threat was real, coming primarily from a portion of the OSP Techs who are the most long tenured employees there and not thrilled about being managed based on performance." (GC Ex. 32K). Cablevision, also, conducted a meeting to discuss this issue with the OSP technicians on or about March 12, 2014. During the meeting, Lajara, one of the discriminatees, admitted to Director of Technical Operations Bob Kennedy ("Kennedy") that he was the one who had written IBEW on the board. He went on to explain to Kennedy why the technicians needed a union, including that they were being asked to perform work that should have been done by electricians. (Tr. 379-381; 428-430; 532-533). After the meeting, Kennedy approached Murray to ask him directly what could be

done to make things better. Murray responded that changes needed to be made at the corporate level. (Tr. 379-381).

In another meeting in or about March 2014, Senior Vice President of Human Resources Paul Hilber ("Hilber") and Kapell met with Murray, Garcia and approximately 20 to 30 of their coworkers. During the meeting, Garcia began questioning Kapell about the elimination of the Cash Balance benefit. Kapell responded, in part, by telling Garcia that she was not going to argue with Garcia about it. (Tr. 367-369; 449-451).

A couple of weeks later, on March 31, 2014, there was an email exchange involving Kennedy and Vice President of Technical Operations Lou Riley ("Riley"). These emails confirmed that Garcia and other employees had not only complained about workplace conditions, but threatened to bring a union if their issues were not addressed. (GC Ex. 32 L & M).

On April 3, 2014, Thomas Monaghan documented in an email to Senior Vice President of Field and Network Operations Mike Kaplan ("Kaplan") that he had met with 10 OSP technicians who felt betrayed by CEO James Dolan because of the recent changes to terms and conditions of employment. Specifically, Monaghan represented that these technicians felt betrayed because during the last union campaign, Dolan promised them he would make changes and now the changes were actually harming employees. Most importantly, the email referred to these 10 OSP technicians as the "good guys" referring to their prior efforts in defeating the union. (GC Ex. 32 N & O). In another email, also sent on April 3, 2014 to Kaplan, there was reference to union activity occurring in the Bronx in response to the recent changes, but this time the activity was noted as being primarily from the same technicians who were pro-union in the past. (GC Ex. 32P).

Murray, Paez and Garcia discussed Cablevision's recent changes amongst themselves. (Tr. 371-372, 374, 451, 454). Murray testified that he even complained to two supervisors, Donovan Reid ("Reid") and Andel Brady ("Brady"), about the changes. (Tr.371, 373). At some point, Murray informed Reid that he was going to contact Local 3 IBEW. (Tr. 528).

Back to Back Management Meetings

In March 2014, Respondent held a mandatory "union awareness" meeting for supervisory and management personnel. This meeting was conducted by an attorney off-site and lasted for five hours. (Tr. 528-530). By April 3, 2014, Cablevision began scheduling back to back management meetings, with little or no notice, to discuss union activity. (Tr. 533-534; 542; GC Ex. 18).

Specifically, on April 3, 2014, Kennedy conducted a meeting of all the daytime OSP supervisors, including Reid, where Kennedy asked them whether they had heard or seen anything regarding union activity. (TR. 533-535). Later that day, Reid testified that he also participated in another meeting by conference call with Monopoli and Supervisor Jason Vanderbilt. (Tr. 535). After this call, Reid was instructed to attend another meeting at 7:30 am the next day (April 4, 2016). (Tr. 542) Director of Human Resources Hector Reyes ("Reyes"), Human Resources Manager Gina Grella ("Grella"), Kennedy and Monopoli were present at this meeting along with supervisors Reid, Brady and Isaacs. Grella distributed two documents at this meeting. (Tr. 542-543) One was a letter from Vice President of Operations Comstock urging employees not to sign authorization cards for Local 3 IBEW. The letter concluded by providing "we urge you not to make a commitment to a union which you may later regret, based solely on the union's propaganda." (emphasis in the original). (Tr. 543; GC Ex. 13). The other letter was addressed to all of the supervisors regarding the do's and don't of anti-union activity. According

to Reid, Monopoli informed the supervisors that he was brought in for exactly this type of situation. (Tr. 543). During the meeting, all of the supervisors were instructed to distribute Comstock's letter to the employees and report back their reactions. Grella, Reyes, and Monopoli and other members of management met with supervisors in groups later that day to hear reports regarding their discussions with team members. (Tr. 248-250, 544-546)

Finally in another meeting, also on April 4, 2014, Torres informed the supervisors that he wanted to know where each employee stood if there was union election today. He asked the supervisors to designate each employee as a Yankees fan, if pro-company, Red Sox fan if pro-union employees and Mets fan if undecided. (Tr. 547-548; GC 19A&B)[2] Torres created a list of all the designations that provided that 54 out of 104 were pro-union, including the six discriminatees. (Tr. 563-564; GC Ex. 19A and B). While Hilber denied seeing the list, he did not deny having knowledge of who was pro-union or not. (Tr. 313-314)

Transfer of Six Employees

On May 7, 2014, Cablevision announced that the Charging Parties and three other employees were being involuntarily transferred from the Bronx to other work locations. (Tr. 383-384; 506-507). The transfers occurred immediately as employees were informed and formally transferred on the same day. (Tr. 175, 383,434-435,456-457). Paez and Murray's new supervisors only found out that they were being transferred on the day of the transfer. (Tr. 388; 440; 685).

Hilber testified that the six transfers were necessary because employees were not reporting inappropriate conduct. (Tr. 664). Specifically, Hilber testified that "[t]he overall environment within the OSP Team in the Bronx was – these are my words—disgraceful. The – I used the phrase before – people went sort of native and they were making their own decisions.

[2] Transcript incorrectly states "young kids" rather than Yankees.

The lack of – the complete acceptance of events, coercion, physical intimidation was – as far as I'm concerned – out of control and we needed to take serious actions because we needed it." (Tr. 664). Hilber was also aware, however, that at least three supervisors, Reid, Ewan Issacs ("Issacs") and Brady were aware of Felix's inappropriate misconduct, but failed to take any action. (Tr. 660-661). Hilber did not testify about any other specific incidents of inappropriate conduct other than the Felix instance.

Hilber further testified that within OSP "they were managing their own culture and taking their own course of actions without engaging the appropriate channels within the business." (Tr. 656). Again, Hilber testified only about general statements that were allegedly made, including "We're men. We take care of our own, our own business, our own issues. We don't need other people to intervene." (Id). No other information was provided about these statements, including who said them, and when and where. Hilber did confirm though that the transfers of the six discriminatees were not disciplinary in nature. (Tr. 302).

Although Hilber claims that the transfers were necessary because employees were not reporting inappropriate conduct, (Tr. 664), it is undisputed that, at the time, Garcia informed his supervisor, Alex Dononvan, that he was having problems with Felix. In fact, Garcia told Grella, during the investigation into Felix's inappropriate conduct, that Donovan was aware that he was having problems with Felix because Dononvan approved Garcia's request to move off the night shift. (GC Ex. 23B at 5-6).

Grella informed Garcia that at least in some of the instances the decision to transfer was based on the location resulting in short commutes. Garcia responded he lived five minutes from the Bronx location. (Tr. 460; GC Ex. 17(a);23(a) at p. 3 and 5-6). Another OSP technician, Melvin Encarnacion ("Encarnacion"), testified that he requested a transfer to Connecticut where

he resides on the day the transfers were announced. However, Cablevision did not transfer him. (Tr. 506-507). Encarnacion testified that during the meeting to discuss transfers, Senior Vice President of Network Infrastructure Pragash Pillai ("Pillai") told him that he "was one of the good guys." (Tr. 508).[3] This was further confirmed by Torres' designation of Encarnacion as a Met or someone who was on the fence about unionization, unlike the six discriminatees who were designated as Red Sox fans or pro-union. (GC Exs. 19A, 19B).

All three Charging Parties asked Cablevision to reconsider its decision to transfer them. Murray requested more time to make arrangements for his wife and son, whom he commuted with. However, he was told that the decision was effective immediately and security escorted him out of the facility. (Tr. 386-387) Garcia recorded the meeting in which he was informed that he was being transferred. Initially, Garcia was told that he would be transferred to Yorktown Heights, but the next day after speaking with Kennedy and Grella again, he was provided with several locations out of which he selected Stamford. (Tr. 358-359; GC Ex. 17A) Paez spoke with Hilber about the difficulties that were created by the transfer because he had commuted with his wife when he was assigned to the Bronx. (Tr. 442-444) Paez was instructed to report at his new location in Litchfield, CT that day and after checking in he could take the rest of the day of to drive back to the Bronx and pick up his wife. (Tr. 435-436) At one point, Paez requested a transfer to a city environment. (Tr. 442, 670-671; GC Ex. 24) Riley sent an email to Hilber, Grella, Kennedy and Reyes that provided the following:

> Stamford could be a possibility its about 40 miles from his house. Norwalk is out Paul is there. Bridgeport is about 20 miles from his house.
> My concern is if we move [Paez] are we going to get the other guys calling. On Friday Paul spoke with HR and went home because he was upset, is he waiting to see what happens with Bernie's request!

[3] While Hilber testified that he did not hear Pillai make this statement, Pillai did not testify to refute Encarnacion's testimony. (Tr. 689).

> I don't think we should be giving into these guys they were moved for a reason...Just my thoughts. (emphasis added) (GC Ex. 24).

Paez was not reassigned from Litchfield and was told that he could post for other positions as they became available. (Tr. 443-444; GC Ex. 24).

Grella testified that the individuals involved in the decision to transfer the employees were her, Monopoli, Kennedy, Riley, Senior Vice President of Field Operations Mike Kaplan, Pillai, Hilber and Reyes. (Tr. 176-177). Kennedy, however, informed Garcia during his transfer meeting that he and Grella had no involvement in the decision to transfer and that it was made by the senior management team. (GC Ex. 17(a); 23(a) at p. 3 and 5-6).

There is no other evidence of any involuntary transfers occurring in the Bronx, except for one isolated instance. (GC Ex. 6).

ARGUMENT

THE ALJ CORRECTLY FOUND THAT PROTECTED ACTIVITY WAS A MOTIVATING FACTOR IN CABLEVISION'S DECISION TO TRANSFER THE EMPLOYEES

Cablevision's claim that it had no knowledge of the discriminatees' union activity or other protected activity has no merit. Not only was Cablevision fully aware of their protected activity, but the pretextual nature of the transfers along with the timing and manner establish a violation of the Act.

To determine whether an employer's action is unlawful, the Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 35 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under this framework, the General Counsel must prove by a

preponderance of the evidence that an employee's union or protected activity was a motivating factor in the employer's actions. The elements required to support such a showing are union or protected concerted activity, the employer's knowledge of that activity, and animus on the part of the employer. *See, e.g., Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Here, the ALJ correctly found that there was more than sufficient evidence to establish a *prima facie* case that Cablevision's decision to transfer the employees was based on a discriminatory motive.

A. Cablevision Had Knowledge of Charging Parties and Other Discriminatees' Union Activity and Other Protected Activity (Responding to Exceptions 1-10, 12-16, 23-32, 37, 47, 49-57, 59, 79, 81 and 83)

The ALJ correctly found that Cablevision was aware that the six discriminatees were union supporters who engaged in protected concerted activity before their transfer. After monitoring their activity and concluding that the threat of unionization was real, Cablevision actively campaigned against the union, including transferring the six discriminatees.

As a preliminary matter, in finding that Cablevision had knowledge of the discriminatees' union or other protected activity, the ALJ did not rely on past organizing activity, as Cablevision incorrectly argues. (ALJD p.16-18; Resp. Br. p. 20). There simply was no need. The past union organizing drive, if anything, establishes that Cablevision and its employees were no stranger to union activity. After CWA's successful organizing drive in Brooklyn and an unsuccessful attempt to organize two different units of Bronx employees in 2012, (Tr. 349-350, 395, 427), the record establishes that by September 17, 2013, Cablevision was aware that there was renewed organizing activity occurring in the Bronx, (GC Ex. 32A, E).

In fact, as early as June 2013, a supervisor approached Murray in the field to ask him specifically what was going on with him and the union. The supervisor told Murray that

Executive Vice President of Field Operation Monopoli believed that both Murray and Paez were behind the union. Neither Monopoli or the supervisor refuted this testimony.

There is no dispute that after monitoring union activity, on April 4, 2016, Torres and the OSP supervisors designated each of the OSP technicians as either pro-union, pro-company or undecided. Torres created a list of these findings. The purpose of this information was to determine where each OSP technician stood if a union election was held that day. Garcia, Murray, Paez and the other discriminatees were unsurprisingly designated as union supporters. (Tr. 547; GC 19(a) and (b)). There is no evidence that this information was not shared by Torres with any of the other managers.

While this list of union supporters, alone, satisfies the requirement that Cablevision was aware of the six discriminatees' union activity, Cablevision incorrectly argues that this knowledge should not be imputed to Respondent. Specifically, Cablevision argues that because Hilber testified that he had never seen the list before, it was incorrect for the ALJ to impute this knowledge to Cablevision as a matter of law. (Resp. Br. 23). However, in *Copper River*, which Cablevision relies on, all three decision makers testified and denied having knowledge of the union activity, which is not the case here. *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, 2014 WL 808076 at 43 (February 28, 2015) ("Board precedent does not require direct evidence that the manager who took an adverse employment action against an employee personally knew of that employee's union activity."). Hilber was one of seven decision makers. His denial alone does not contradict a finding that Cablevision was aware who the union supporters were before it made the decision to transfer the six discriminatees. In any event, Hilber's denial was limited to whether he saw the document before, not whether Torres or

anyone else shared the information with him. Absent any contradictory statement, the ALJ correctly imputed knowledge to Cablevision.

Torres also was not a low-level manager as Cablevision implies. (Resp. Br. at 22 and 30). Reyes who was one of the decision makers, reported to Torres. And Grella who was also a decision maker, reported to Reyes. There is no basis to find that Torres would not have shared this information with either Reyes and Grella, his subordinates.

Moreover, it was not unusual for Cablevision to refer to certain employees as the "usual union promoters." (GC Ex. 27). While Cablevision never identified who it was referring to as the "usual union promoters," the evidence establishes that they could only have been the six discriminatees. There is no denying that Cablevision only involuntarily transferred six union supporters who were some of the more vocal employees regarding both workplace changes and unionization.

As of March 12, 2014, Cablevision concluded that the threat of a union was real after finding that Lajara had written IBEW on the board. Cablevision determined that the threat was coming primarily from a portion of the OSP Techs who were the most long tenure employees. (GC Ex. 32L) Cablevision's claim that these statements could not be directly attributed to any of the six discriminatees is not true. Not only did Lajara admit to Kennedy that he wrote IBEW, but after the meeting where Lajara admitted it, Kennedy approached Murray to ask him directly what could be done to make things better. There was no reason for Kennedy to approach Murray after this meeting, unless he believed that Murray was also involved with Lajara in union activity.

Garcia also attended a meeting with Kennedy, where the technicians made it clear that they were ready to unionize Cablevision because of all the negative changes, including the elimination of the pension plan. (GC Ex. 32L). Garcia was a vocal employee, where in at least

one other meeting Kapell told him that she did not want argue with him about changes that were being made to the Cash Balance Plan. While all of this was occurring, Cablevision was also well aware that CWA was directly communicating with the Bronx technicians. (GC Ex. 32J).

Torres' list of union supporters was based on more than mere rumours as Cablevision incorrectly argues. It was a culmination of Cablevision monitoring union activity, identifying good and bad guys, identifying usual union promoters, and supervisors and managers reporting employee reactions to recent workplace changes and whether or not they supported the union. Absent any contradictory evidence, the ALJ correctly imputed OSP Director Torres and the OSP supervisors knowledge of union activity to Cablevision. Most importantly, after determining that 27 out of 52 technicians supported a union - meaning Cablevision would have lost the election if one was held - Cablevision transferred six union supporters, eliminating any threat of a union.

B. The Judge Correctly Found Evidence of Cablevision's Discriminatory Motive Based on the Pretextual Nature of the Transfers (Responding to Exceptions 3, 11, 12, 26, 28-31, 33-45, 49, 52-58, 60, 63, 75, 79, 81 and 83).

Cablevision's claim that it had no choice but to transfer the six discriminatees to a fix a culture in which inappropriate conduct was not being reported is not supported by the record. Leaving aside the fact that the only employees transferred were union supporters, Cablevision cannot dispute that i) employees reported the inappropriate conduct and ii) supervisors who were aware of the conduct failed to take any action.

It is well established that a "discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *See Tubular Corp.*, 337 NLRB 99 (2001); *Sunshine Piping, Inc.*, 351 NLRB 1371, 1390 (2007); *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991); *In Re Mesker Door, Inc.*, 357 NLRB No. 59 (Aug. 24, 2011). The following factors may be relied on to establish discriminatory motive: (1)

timing, *see, e.g., NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("timing alone may suggest anti-union animus as a motivating factor in an employer's action"). (2) the presence of other unfair labor practices; *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 251 fn.2, 260 (2000), enfd. 11 Fed.Appx. 372 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993). (3) statements and actions showing the employer's general and specific animus; *NLRB v. Vemco*, Inc., 989 F.2d 1468, 1473–74 (6th Cir. 1993) (statements, even if lawful, serve as background evidence of animus); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999). (4) disparate treatment; *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). (5) departure from past practice; *JAMCO*, 294 NLRB 896, 905 (1989), aff'd mem., 927 F.2d 614 (11th Cir. 1991), cert. denied, 502 U.S. 814 (1991). (6) failing to adequately investigate whether the employee engaged in the alleged misconduct; *W.W. Grainger, Inc., v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978) and (7) evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext. *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998).

Proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to "make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action" as Cablevision incorrectly argues. *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). Rather, the Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive," as is the case here. *J.S. Troup Electric*, 344 NLRB 1009 (2005) (*citing Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir.

1966). Here, the ALJ correctly found that the General Counsel established Cablevision's discriminatory motive in transferring six union supporters.

1. Cablevision Failed to Provide Any Evidence to Support its Decision to Transfer the Six Employees.

Where an employer's explanation is "pretextual", as is the case here, "that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

First, Cablevision could not even establish, without contradiction, who made the decision to transfer the six discriminatees. While Grella testified that she, Monopoli, Kennedy, Riley, Kaplan, Pillai, Hilber and Reyes were all involved in the decision to transfer the six discriminatees, the evidence shows otherwise. Kennedy specifically informed Garcia during his transfer meeting that neither he nor Grella had any involvement in the transfer decisions. Although Grella was present when Kennedy told Garcia this, she failed to provide any explanation for this inconsistency during her testimony. Second, Cablevision's repeated claim that the transfers were based on the investigation into Felix's conduct is also inconsistent with the record. Grella unequivocally testified that the transfers had nothing to do with the Felix investigation. Third, it remains unclear what inappropriate conduct that Cablevision relied on to justify its transfer of the six discriminatees. Despite Cablevision's claim that it needed to "fix a culture where inappropriate conduct was being unreported," there is no evidence that this was even the case. (Resp. Br. at 11-12; Tr. 656-657, 663-664.) Hilber's testimony about OSP managing its own culture was general and vague, at best. Cablevision's failure to establish a single instance of inappropriate conduct that was not reported further supports a finding that the transfers were based on a pretext. Fourth, to the extent that Cablevision alleges that it was

Felix's inappropriate conduct that led to the transfers, it is undisputed that Garcia reported the conduct to his supervisor, but was transferred anyways. Specifically, during the investigation into Felix's conduct, Garcia informed Grella that he told his supervisor at the time that he was having problems with Felix in order to obtain approval for a shift change. Cablevision's transfer of Garcia, in this case, establishes that the transfers were based solely on union activity and nothing more. Finally, Cablevision could not provide any basis for determining that the six discriminatees needed a fresh start and not any of the other OSP technicians. Cablevision even admits that it was "Reid's failure to take any corrective action [that] had played a major role in creating the abusive, threatening and unsafe work environment in the Bronx OSP department." (Resp. Br. at 11). Unable to provide any basis for transferring the six discriminatees, Cablevision claims that its decision was based primarily on commuting distances. Even assuming commuting distances had anything to do with correcting a work environment where inappropriate conducted was not being reported, there is no dispute that Garcia, Lajara and Roberts lived in the Bronx, but were transferred to locations outside of the Bronx. In fact, Encarnacion who live in CT where some of the employees were transferred, was told that he was not being transferred because he was one of the "good guys, " despite the shorter commute he would have had. There was also evidence that while the remaining OSP technicians would continue to work in the Bronx, that Cablevision would not even consider transferring Paez to the same location that Murray was transferred. (GC Ex. 24).

Cablevision cannot satisfy its burden only by showing that it had a legitimate reason for its action. It must demonstrate, at a minimum, that it would have taken the same action, absent the protected conduct, which Cablevision cannot do here. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011). Even assuming that Cablevision need to transfer certain employees to

address problems with the work environment, there still is no basis to find that Cablevision would have transferred the six discriminatees, absent their union and other protected activity.

2. The Judge Did Not Substitute Her Own Business Judgment for that of Cablevision.

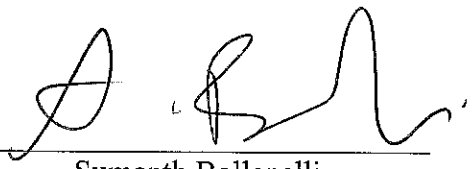
Cablevision also incorrectly argues that the ALJ substituted her own business judgment for that of Cablevision. (Resp. Br. 17). The ALJ did not find that Cablevision could have done a better job in exercising its business judgment in as much as she found that Cablevision failed to provide any rational basis for transferring six union supporters. *See Welch Scientific Co. v. NLRB,* 340 F.2d 199, 203 (2d Cir.1965) ("[I]f the conduct complained of otherwise violated Section 8(a)(1), good faith is no defense. The cases clearly demonstrate that it is the tendency of an employer's conduct to interfere with the rights of his employees protected by Section 8(a)(1), rather than his motives, that is controlling.") It is well-settled that the pretextual nature of an employer's reason for an adverse action can support both an inference that an employer had both knowledge of a discriminatee's protected activity and animus towards that activity. *State Plaza Hotel,* 347 NLRB 755, 757 (2006) citing *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). By transferring six employees who were all known union supporters, without any basis, Cablevision's action establishes that not only was it aware of the discriminatees union and other protected activity, but it unlawfully transferred them because of this activity.

CONCLUSION

Based on the foregoing reasons, Charging Parties respectfully request that the Board reject and dismiss each of Cablevision's Exceptions and affirm the Administrative Law Judge's Decision and Order.

Dated: New York, New York
December 19, 2016

COMMUNICATIONS WORKERS OF AMERICA, DISTRICT ONE, LEGAL DEPARTMENT
Attorneys for Charging Parties

By: 
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CERTIFICATE OF SERVICE

The undersigned counsel attests that on December 19, 2016, Charging Parties' Brief Answering Respondent's Exceptions was electronically filed and served by electronic mail on the following parties:

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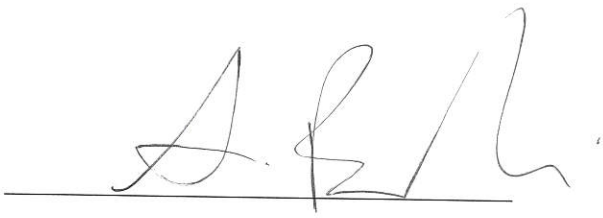

Sumanth Bollepalli